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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

NO. 400

JACKIE PACKER FRANCIS, a Minor, DENNIS RAY FRANCIS, a Minor, and JAMES BRENT FRANCIS, a Minor, by and Through Their General Guardians, RAY E. FRANCIS and VIRGIL O. PACKER,

Petitioners,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Respondent

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

PAUL H. RAY
S. J. QUINNEY
Counsel for Respondent

RAY, QUINNEY & NEBEKER
and
GRANT C. AADNESEN
Of Counsel

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Petitioners,

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SOUTHERN PACIFIC COMPANY, a Corporation,

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BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

SUMMARY

The issues of fact in this case were settled against petitioners by the jury. The decision below is in harmony with all applicable decisions of this court and there is no conflict among the circuits. None of the reasons ordinarily assigned by this court for the granting of writs of certiorari is apparent here.

The collision resulting in the death of petitioners' decedent occurred only because respondent's engineer was the victim of a sudden, unexpected and fatal heart attack. The collision was not the result of misconduct on the part of the engineer or any other employee of respondent.

Petitioners' decedent was riding in interstate commerce on a free pass which contains these conditions:

"CONDITIONS

"This free pass is not transferable, will be taken up and forfeited if presented or used by a person not designated on its face, and is subject to revocation at any time without notice. In its use the user assumes all risk of injury to person or property and of loss of property whether by negligence or otherwise, and absolves the issuing company and its officers and employes from any liability therefore. Use hereof in violation of any law is prohibited." (R. 9)

A jury tried the issues of fact and resolved them against petitioners. Petitioners participated in the selection of the jury with no criticism of the panel and formally accepted the jury. They went to trial with no objection to the jury or any member thereof. They first complained of the jury thirty-one days after judgment. Both the Rules of Civil Procedure and a decent respect for fair play say that such complaint came too late.

STATEMENT OF THE CASE

Jack Francis,[1] whose death is the subject of inquiry here, was riding in the rear car of the first section of respondent's ~~westbound train No. 21~~. He was riding in interstate commerce from Ogden in Utah, to Carlin in Nevada. (R. 2, 74) At the time of his injury and death, he was on vacation and not engaged in any employment. When employed, he was in train service with respondent. At the time of his death he was traveling upon the free pass referred to in the summary above.

Francis was killed when the second section of train No. 21 ran into the rear end of the train upon which he was riding. No claim is made by petitioners that there was any misconduct in the handling of the train upon which Francis was riding. The engine of the second section was

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[1] Francis and his wife were both killed at the same time and a separate action was brought for the death of Mrs. Francis. (R. 41)

manned by Engineer McDonald and Fireman Hardman. Petitioners themselves made undisputed proof that Fireman Hardman was free of negligence or other misconduct. The trial court and the jury were concerned only with the conduct of Engineer McDonald.

Engineer McDonald was dead of a heart attack when the collision between his engine and the rear end of the preceding train occurred. He was a veteran of thirty years' experience as a locomotive engineer and long familiar with the rules of safety and with the place where the accident occurred. The record contains nothing which would justify a finding that McDonald either heedlessly or willfully ignored the rules of safety.

McDonald showed up at the enginehouse in Ogden on the morning involved some little time before starting upon his fatal trip. He exchanged greetings with acquaintances and engaged briefly in conversation with Hardman, who was to be his fireman for the first time. (R. 83) To persons who saw him on that morning, he appeared to be in good health and spirits. His conversation with Hardman involved steam, water and oil. He impressed upon Hardman the necessity of seeing to it that everything was in perfect running order before departure. (R. 83, 91, 92) Within a few minutes thereafter he was dead and came into collision with the rear end of the train ahead of him.

McDonald's train had been preceded out of Ogden by one of respondent's freight trains and by the first section of No. 21. West of block signal 7639 the freight train became disabled and stopped. No claim has ever been made of any negligence or misconduct in the handling of the freight train. The first section, after stopping between signals 7649 and 7639, moved slowly forward and the collision occurred some 2458 feet west of 7639.

Fireman Hardman testified that after making the curve west of Ogden and near Little Mountain, Engineer McDonald somewhat reduced his speed in accordance with the regular custom of the engineers at that place. He very soon thereafter resumed normal speed. (R. 90) Hardman testi-

fied that at two different block signals McDonald had stated in response to a question with respect to the signals, "I got her." (R. 86) It was clear and undisputed that neither one of the signals just referred to was the last one before the collision. The block signal immediately before the collision was 7639; the one next to that was 7649; and the one still further east was 7659. (R. 63) The block signals were approximately one mile apart. Hardman was making his first trip on this run and showed a lack of acquaintance with the signal numbers and their locations. But under leading questions he finally testified, "If I get my signal numbers straight," (R. 86), it was at signals 7659 and 7649 that he said, "I got her."

A jury would be justified in finding that as late as the time Engineer McDonald approached 7649 he was still in possession of his faculties, or at least able to speak. The morning was foggy and neither Engineer Ware, who drove the first section, nor Fireman Hardman on the second section was able to make out the position of the signals until they were very near.

Upon approaching signal 7639 Hardman observed that it was red. He called loudly to McDonald and received no response, either by voice or movement of any kind. (R. 86, 87). Two thousand feet, or such a matter, further on, Hardman saw the red taillights of the first section. (R. 88) Again he shouted warning to McDonald and again he received no response whatsoever. (R. 88)

One of the first effects of the collision which followed was to instantly release steam under high pressure and in great volume into the cab where McDonald and Hardman had occupied their positions as fireman and engineer, respectively. (R. 94, 200, 202, 203). Hardman promptly left the cab and thereby avoided burning or scalding by steam. McDonald, on the other hand, did not move and plainly made no effort whatsoever to escape the scalding effects of steam which poured into the cab and upon him. (Exhibits 17, 18) The collision produced no injury to McDonald which might have proved fatal, and if he had not been dead

at the time of the collision he certainly would have made every effort to avoid the scalding steam. As he sat there after the wreck, he and his engine furnished the most eloquent and dramatic evidence that he had not consciously run his engine into another train, but that death had closed out his power to function and that it was death and not willful misconduct, or any misconduct on the part of McDonald, which caused the collision. McDonald sat at his accustomed seat before the throttle. His chin rested upon his chest, his right arm lay upon the window sill by his side, his left hand and forearm hung limply over the throttle quadrant. Before him in easy reach of either hand were the devices by which the engineer controlled his engine and train: air brakes (both automatic and emergency), steam throttle, reverse lever and sander. (Exhibit 18, R. 116, 200, 201, 202) After the collision all of those instruments were found to be so adjusted and in such relation, one to the other, as to provide smooth and continued forward motion at a speed from sixty to sixty-five miles per hour. (R. 201, 202, 204, 205) The positions of all of those instruments and their relation, one to the other, is of importance in this case. Proof is thus furnished that no effort was made immediately before the collision to put the instruments in operation to stop the train. The fact that those instruments were so set disproves the principal contention made by counsel upon the trial, before the court below, and in his brief here that immediately before the impact the brakes had been heavily applied by the engineer.

Petitioners' counsel knew that Engineer McDonald died of a heart failure and that he was dead when the impact occurred, but they sought for their own purposes to put life into him immediately before the impact so as to sustain a charge of conscious and willful misconduct. The only hope of sustaining such a charge lay in the possibility that they might persuade the court and jury that McDonald consciously made a service application of the brakes within approximately twelve seconds prior to the impact. The condition of the controls demonstrates that no such application ever took place. Counsel claim that McDonald

was alive approximately twelve seconds before the accident and that his heart failure might have been brought on by consciousness that a collision would shortly occur. They were unable to induce the jury to any such belief.

An autopsy was performed upon the body of McDonald by Colonel Frank Queen, a distinguished pathologist then located at the Bushnell General Hospital, a short distance north of Ogden. Dr. Queen's testimony and his autopsy report were made part of the record by deposition. He gave it as his opinion that the cause of McDonald's death was coronary occlusion, which is a failure of the heart to function by reason of the occlusion of one of the main arteries supplying the heart muscles with blood. (R. 162) He reached that conclusion from a post-mortem examination of the arteries of the heart itself. The conclusion that the heart failure occurred, or the prostration and loss of function attendant upon heart failure took possession of McDonald prior to the wreck, is forced upon us by the fact that he made no effort whatever to escape the effects of scalding steam. By the autopsy report, which is in the record, and which is undisputed and unimpaired by any contrary testimony, the skin on McDonald's face, chest, arms, hands and upper legs was completely cooked by steam. The post-mortem examination likewise demonstrated beyond dispute that the skin was dead before it was burned. (R. 162, 174, 175) If the skin had been alive when the hot steam came in contact with it, there would have been certain chemical and cellular activity, which was wholly missing in this case. Furthermore, if he had been alive when the steam was released upon him, he would not have continued to sit complacently in his place before the throttle. No jury could be permitted to find that McDonald was alive when the escaping steam struck him. His circulation had stopped and he was stone dead. Most important of all is the fact that Hardman, who was trying to attract his attention, got no response whatsoever and saw no effort to apply the brakes. It is true that upon cross examination Dr. Queen and Dr. Ogilvie stated that when the scenery is set for the occurrence of coronary occlusion, its onset might be hastened by shock

or fright. They both testified, however, that the onset may come in the absence of either and both testified that the deceased did not die from shock.

To support the claim of petitioners that McDonald was in possession of his faculties shortly before the collision, counsel undertook to prove that at some point between 7639 and the point of collision, McDonald made a heavy service application of the brakes in the cab of his engine. They produced the conductor, two brakemen, and one express messenger, all of whom were riding in the twentieth and last car of McDonald's train. Each of those witnesses had testified at hearings conducted by the Interstate Commerce Commission and by public authorities of Weber County, Utah. Upon direct examination at those hearings and on direct examination before the trial court, those witnesses gave testimony, which if unchanged by cross or further examination might have justified a jury in finding that McDonald applied the brakes not long before the collision, but each and every one of those witnesses upon cross examination admitted that what they had at one time believed was a service application of the brakes might just as well have been the collision itself. They admitted facts and conclusions which made it plain beyond all doubt that it was the collision which they had at one time mistaken for a service application of brakes. We particularly invite the court's attention to pages 93-103, 105, 110-112, 120-121, 125, 126 of the record for complete confirmation of our contention in this respect. (See Appendix pages I-IX.) What the witnesses might have said upon direct examination in connection with this matter is of no importance, as it is well settled in the laws of Utah and elsewhere that a witness's testimony is no stronger than it is left upon cross examination. Note the following from *Putnam v. Industrial Commission, et al*, 80 Utah 187, 14 P. (2d) 973:

> "* * * the familiar rule is applicable that testimony of a witness on his direct examination is no stronger than as modified or left by his further examination or by his cross-examination."

There is no room for the assumption that if McDonald was conscious and in possession of his faculties when he reached signal 7649 and drove his engine past it that he was guilty of either negligence or willful misconduct for passing that signal. The record makes it plain that such was not the case. The correctness of this view is illustrated by the conduct of Engineer Ware, who drove the engine pulling the first section of train 21. Block signals involved operate on the overlapping principle, which means that an obstacle upon the track will activate the first and second signals immediately behind it. (R. 65) When Engineer Ware, westbound, approached signal 7649, the freight train was stopped between 7629 and 7639. Signal 7649 was, therefore, red, but Ware did not and perhaps could not stop short of the signal. (R. 73, 75) Upon seeing it in stop position and displaying red, he reduced speed and came to an easy stop halfway between 7649 and 7639. He then moved ahead cautiously until he had passed 7639 and was near the rear end of the freight train. (R. 75) What Ware did was in strict conformity with the rules of safety and no claim was ever made that Ware was negligent. The first red signal informs the engineer that danger is ahead at least one full block. It was not negligent for McDonald to pass 7649, but the rules required him to stop in that block as Ware had done. The only fair inference is that McDonald, like Ware, could not see the position of 7649 until he was very near to it and much too close to stop before passing it. When McDonald reached 7649, he may have still been in possession of his faculties. He was then one and one-half minutes in time and one and one-half miles in distance from the point of collision. Fifty to sixty seconds later the red light of 7639 and the frightened shouts of Fireman Hardman failed to arouse him from his oblivion. Ninety seconds later he was sitting dead in his cab, allowing the steam to scald his face and chest. That departure from the normal habits and training of a lifetime, taken in connection with the condition of his heart, as shown upon post-mortem examination, led to the scientific conclusion by Dr. Ogilvie that a heart seizure had prevented normal reaction as McDonald entered the block signal following 7649.

No claim was made that Hardman was guilty of negligence, much less wanton or willful misconduct. When he first became aware of impending danger he endeavored, without success, to arouse the engineer. He then busied himself putting out his fire and controlling the fuel. (R. 88) Counsel for petitioners had as their witness Ross E. Campbell, a fireman expert in the duties of his calling. He testified that under the same conditions a train fireman would have done as Hardman did. (R. 81, 82) Counsel in their brief would have this court believe that Hardman was thrown into a panic when he saw a red light. The record is to the contrary. Hardman began putting things in order in anticipation of a stop. The jury in the exercise of a calm judgment could never conclude that McDonald was in possession of his faculties at a time when otherwise he would have been stopping his train, and any such finding would have been without substantial support in the record, and would have been based upon emotional consideration only. Not only is there no substantial evidence in the record that McDonald was guilty of wanton or willful misconduct, there is no substantial evidence in the record that he was guilty of negligence of any degree. Upon the whole record it is plain that this ghastly tragedy resulted not from the negligence or willful misconduct of McDonald, but from the wholly fortuitous intervention of a heart attack. Apparently, from the post-mortem examination, the stage was set for McDonald to receive a coronary occlusion. There is no evidence that he knew or that anyone else knew of such a setting or that such a setting could have been discovered. The attack might have overtaken him as he sat at his meal, as he read his morning paper, or as he rested in his bed. Fate willed that the attack should come while he was at the throttle of his engine and for that neither he nor the respondent can be charged with willful or wanton misconduct or negligence of any grade.

Conditions of the Free Pass Are Binding Upon Petitioner

The free pass upon which Francis was riding was issued by respondent under authority of the Hepburn Act, 34 U. S. St. at L. 584, 49 U. S. C. A. Sec. 1.[1]

The right of the company to issue the pass for interstate transportation to Francis and his right to accept and use it, both having their origin in an act of Congress to regulate commerce among the states, the rights and relationships created by the issuance and use of the pass are decided and settled by the Federal laws and decisions. The leading case upon this point is *Kansas City Southern Railway Company v. Van Zant*, 260 U. S. 459, 67 L. Ed. 348, decided by this court in 1923. That case involved the effect of a condition in a free pass issued by a railway company for interstate commerce. Van Zant suffered injuries in Missouri while using the pass in interstate commerce. The conditions of Van Zant's pass were substantially the same as those now under review, and the company there averred that the conditions constituted a defense against the charge of negligence. The respondent replied that she received the pass as a resident of Kansas and that she was injured in Missouri and that in both those states such a limitation upon liability as that contained in the pass was unlawful as against public policy. This court ruled that the laws of Kansas and Missouri were without effect and in the course of its opinion announcing the ruling for which we now contend stated:

> "The provision for passes, with its sanction in penalties, is a regulation of interstate commerce to the completion of which the determination of the effect of the passes is necessary. We think, therefore, free passes in their entirety are taken charge of,—not only their permission and use, but the limitations and

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[1] See Appendix.

conditions upon their use. Or, to put it another way, and to specialize, the relation of their users to the railroad which issued them, the fact and measure of responsibility the railroad incurs by their issue, and the extent of the right the person to whom issued acquires, are taken charge of. And that responsibility and those rights, this court has decided, the railroad company can control by conditions in the passes. Antecedently to the passage of the Hepburn Act, we decided that a passenger who accepts a free pass may exempt a carrier from responsibility for negligence, and no public policy is violated thereby. *Northern P. R. Co. v. Adams,* 192 U. S. 440, 48 L. Ed. 513, 24 Sup. Ct. Rep. 408; *Boering v. Chesapeake Beach R. Co.,* 193 U. S. 442, 48 L. Ed. 742, 24 Sup. Ct. Rep. 515.

"Those cases were considered and applied as giving validity to the stipulation of passes issued under the act in *Charleston & W. C. R. Co. v. Thompson,* 234 U. S. 576, 58 L. Ed. 1476, 34 Sup. Ct. Rep. 964, according thereby freedom of transportation to the possessor of a pass, and giving assurance to the railroad company that its gratuity will not be given the consequences of compensated right * * *."

The rule of the *Van Zant* case as crystallized in the foregoing quotation has continued to be the settled law of the land.

To the same effect as *Kansas City Southern Railway Co. v. Van Zant,* supra, are *Northern Pacific Company v. Adams,* 192 U. S. 440, 48 L. Ed. 513; *Boering v. Chesapeake Beach Railway Company,* 193 U. S. 442, 48 L. Ed. 742; *Charleston and Western Carolina Railway Company v. Thompson,* 234 U. S. 576, 58 L. Ed. 1476. In passing we should like to point out that this court in the case last cited has held that a free pass issued under the statute must be deemed to have been gratuitous.

"As the pass was free under the statute, there is no

question of the validity of its stipulation. This was conceded by the Court of Appeals, as we have stated, and is established by decisions of this court. *Northern Pacific Ry. Company v. Adams*, 192 U. S. 440, 48 L. Ed. 513, 24 Sup. Ct. Rep. 408; *Boering v. Chesapeake Beach R. Co.*, 193 U. S. 442, 48 L. Ed. 742, 24 Sup. Ct. Rep. 515."

The conditions of the pass were binding upon Francis in his lifetime and are to the same extent binding upon the appellants. It is so held by the federal courts, whose decisions are controlling upon the subject, and by the great weight of other authority. In view of the interstate character of the trip, the pass conditions would have been a complete defense against a claim of negligence by deceased if living, but counsel argue that such provision is invalid as against the cause of action of the heirs. They cite in their brief a few cases reflecting the view of the minority courts on this point. One of the jurisdictions from which they cite authority is California. The California court has at times followed the minority view that survivors may have an action when the injured person would have had no right. But the Supreme Court of California clearly argees with us that in cases involving passes like the one now under review, the Federal decisions control and state decisions are of no force or effect. See *Donnelly v. Southern Pacific Company*, 118 P. (2d) 465, where the California Supreme Court says:

"If congress enacts a statute that embraces the general field but does not cover the matter on which the state has ruled, the state statute or decisions is superseded only if congress intended by such legislation to occupy the entire field, thereby excluding all state control, (citing many cases).

"* * * The state courts are then bound by federal decisional law in the field * * *. In 1906 congress passed the Hepburn Act, 34 U. S. Stat. at Large 584, 49 U. S. C. A. 1 et seq., regulating the issuance of free

passes by interstate carriers * * * the Supreme Court of the United States took the position in *Kansas City Southern Ry. Co. v. Van Zant*, 260 U. S. 459, 43 Sup. Ct. 176, 67 L. Ed. 348, that the Hepburn Act was intended to occupy the entire field of free passes, that it superseded all state law in the field, and that the decisions of the federal courts were therefore controlling on the liability of a carrier for negligence to a holder of a pass containing an exculpatory provision. This court is bound by that decision and must therefore disregard the California law and apply the rules established by the decisions of the federal courts.

"The United States Supreme Court has made it clear that a carrier may validly contract to release itself from liability for negligence to the holder of a free pass. *Northern Pacific Ry. Co. v. Adams*, 192 U. S. 440, 24 S. Ct. 408, 48 L. Ed. 513; *Boering v. Chesapeake Beach R. Co.*, 193 U. S. 442, 24 S. Ct. 515, 48 L. Ed. 742; *Charleston & Western Carolina Ry. Co. v. Thompson*, 234 U. S. 576, 34 S. Ct. 964, 58 L. Ed. 1476; *Kansas City Southern Ry. Co. v. Van Zant*, supra.

"Plaintiff contends that while the release is effective as to ordinary negligence, it is not effective as to gross negligence. The federal courts, however, have rejected any distinction between negligence and gross negligence; they recognize no degree of negligence. *New York Central Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627; the *New World v. King*, 16 How. 469, 14 L. Ed. 1019; *Milwaukee & St. Paul Ry. Co. v. Arms*, 91 U. S. 489, 494, 23 L. Ed. 374; *Westre v. Chicago, M. & St. Paul Ry. Co.*, 8 Cir., 2 F. (2d) 227, and cases there cited."

While recovery for death may be had under workmen's compensation laws without regard to fault on the part of either employer or employee, recovery may not be had under wrongful death statutes except upon proof of breach of

duty to deceased. Such is the clear holding of this court in *Northern Pacific Railway Co. v. Adams*, supra. Adams was killed while riding a free pass in interstate commerce. His heirs brought suit under the death statute of Idaho which was substantially identical to the Utah statute. The pass was set up as a defense. Plaintiffs asserted that the pass was no defense against them, inasmuch as they had a right of action separate and distinct from the one which would have been enjoyed in his lifetime by decedent if he had suffered injuries instead of death. In disposing of that point this court said:

> "A statute of Idaho reads as follows:
> " 'When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or, if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as, under all the circumstances of the case, may be just.' Idaho Rev. Stat. Sec. 4100."
>
> "As the negligence of the company, found by the jury to have caused the death, as well as the resulting death, took place in Idaho, the plaintiffs' right of action rests on the statute of that state. What is the scope and meaning of that statute? The circuit court charged the jury:
>
> "'You are not to consider what was the duty of this carrier toward Mr. Adams, who was killed, but the duty which the defendant owed to these plaintiffs; and the duty which they have the right to exact from the defendant in this case is the same duty which the defendant company owed to the public in general.'
>
> "In other words, although it should appear that the company in no respect failed in its duty to the de-

ceased, it could yet be held responsible to the widow and son for the damages they suffered by reason of the death. But that is a misconception. Their right of action arises only when his death is caused by 'the wrongful act or neglect.' If there be no omission of duty to the decedent, his heirs have no claim. Suppose an individual is wantonly assailed, and, in order to protect his own life, is obliged to kill the assailant—may the heirs of the decedent have that act of taking life, rightful as against the decedent, adjudged wrongful as against them, and recover damages from one who did only that which his duty to himself and family required him to do? The statute does not provide that when one's life is taken by another the heirs of the former may recover damages, but only when it is wrongfully taken,—that is, when it is taken in violation of the rights of the decedent; wrongful as against him. 'Neglect' stands in the same category with 'wrongful act.' It implies some ommision of duty.

"The two terms, therefore—wrongful act and neglect,—imply alike the omission of some duty, and that duty must, as stated, be a duty owing to the decedent. It cannot be that, if the death was caused by a rightful act, or an unintentional act, with no omission of duty owing to the decedent, it can be considered wrongful or negligent at the suit of the heirs of the decedent. They claim under him, and they can recover only in case he could have recovered damages had he not been killed, but only injured. The company is not under two different measures of obligation,—one to the passenger and another to his heirs. If it discharges its full obligation to the passengers, his heirs have no right to compel it to pay damages.

"Did the company omit any duty which they owed to the decedent? He was riding on a pass which provided that the company should 'not be liable, under any circumstances whether of negligence of agents

> or otherwise, for any injury to the person.' He was a free passenger, paying nothing for the privilege given him of riding in the coaches of the defendant. He entered those coaches as a licensee, upon conditions which he, with full knowledge, accepted. He was not a passenger for hire, such as was held to be the condition of the parties recovering in *New York C. R. Company v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627, and *Grand Trunk R. Co. v. Stevens*, 95 U. S. 655, 24 L. Ed. 535. • • •"

In the third paragraph of the above quotation [page 449 (U. S.), 516 L. Ed.)], the Circuit Court stated in seven lines what counsel for petitioners have labored over thirty pages to say in their brief. This court rejected the concept there set forth as "a misconception."

The *Adams* case has never been overruled or modified by this court, but was followed in *Michigan Central Railroad v. Vreeland*, 227 U. S. 59, L. Ed. 417; *Kansas City Southern v. Van Zant*, supra; and *Flynn v. N. Y., N. H. & H. Railroad*, 283 U. S. 53, 75 L. Ed. 837. In the *Vreeland* case this court considered the matter at length and concluded that while the cause of action given to the heirs is entirely distinct from the one held in his lifetime by deceased, nevertheless, there is no cause of action in the heirs, unless there would have been one in deceased had he lived. In reaching that conclusion, this court said:

> "But as the foundation of the right of action is the original wrongful injury to the decedent, it has been generally held that the new action is a right dependent upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury. Tiffany, Death by Wrongful Act. Sec. 124; *Louisville, E. & St. L. R. Co. v. Clarke*, 152 U. S. 231, 38 L. Ed. 422, 14 Sup. Ct. Rep. 579; *Read v. Great Eastern R. Co.*, L. R. 3 Q. B. 555, 9 Best. & S. 714, L. J. Q. B. N. S. 278, 18 L. T. N. S. 82, 16 Week. Rep. 1040; *Hecht v. Ohio & M. R. Co.*,

132 Ind. 507, 32 N. E. 302; *Fowlkes v. Nashville & D. R. Co.*, 9 Heisk. 829; *Littlewood v. New York*, 89 N. Y. 24, 42 Am. Rep. 271; *Southern Bell Telph. & Teleg. Co. v. Cassin*, 111 Ga. 575, 50 L. R. A. 694, 36 S. E. 881."

In *Mellon v. Goodyear*, 277 U. S. 335, 72 L. Ed. 906 (Reversing 121 Kan. 392, 247 Pac. 446), this court had before it the question whether a settlement by an employee in his lifetime barred an action after his death by his heirs for his death. The court reviewed the authority upon the subject at great length and followed the rule announced in the *Vreeland* case. In the course of a most illuminating opinion upon the subject the court said:

"Concerning that section, Vreeland's case, supra, declares: 'But as the foundation of the right of action is the original wrongful injury to the decedent, it has been generally held that the new action is a right dependent upon existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury.' And no later opinion here has given expression to any other view.

"By the overwhelming weight of judicial authority, where a statute of the nature of Lord Campbell's Act in effect gives a right to recover damages for the benefit of dependents, the remedy depends upon the existence in the decedent at the time of his death of a right of action to recover for such injury. A settlement by the wrongdoer with the injured person, in the absence of fraud or mistake, precludes any remedy by the personal representative based upon the same wrongful act. Construing the statute of Kansas, the Supreme Court of that state seems to have accepted this generally approved doctrine. *Fuller v. Atchison, T. & S. F. R. Co.*, 124 Kan. 66, 257 Pac. 971.

"'The cases supporting this view, from courts of last resort in twenty-one states, Canada and England,

are collected in a note following the first opinion of the supreme court of Kansas in the present case, reported in 39 A. L. R. 579. And in Tiffany on Death by Wrongful Act, 2d Ed. Sec. 124, the rule (with supporting authorities) is thus broadly stated—

> " 'If the deceased, in his lifetime, has done anything that would operate as a bar to a recovery by him of damages for the personal injury, this will operate equally as a bar in an action by his personal representatives for his death. * * *' "

Subsequently this court reaffirmed the foregoing rule in *Flynn v. New York, N. H. & H. R. Co.*, 283 U. S. 75 L. Ed. 837, and stated:

> "Obviously Flynn's right of action was barred, but it is argued that the right on behalf of the widow and children is distinct; that their cause of action could not arise until Flynn's death, and that therefore the two years did not begin to run until September 1, 1928. But the argument comes too late. It is established that the present right, although not strictly representative, is derivative and dependent upon the continuance of a right in the injured employee at the time of his death. *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 70, 57 L. Ed. 417, 421, 33 S. Ct. 192, Ann. Cas. 1914C, 176. On this ground an effective release by the employee makes it impossible for his administrator to recover. *Mellon v. Goodyear*, 277 U. S. 335, 344, 72 L. Ed. 906, 910, 48 S. Ct. 541. The running of the two years from the time when his cause of action accrued extinguishes it as effectively as a release, *Engel v. Davenport*, 271 U. S. 33, 38, 70 L. Ed. 813, 817, 46 S. Ct. 410, and the same consequence follows. Our conclusion that this action could not be brought is required by the former decisions of this court."

This court further affirmed the rule by its decisions in

Frese v. C. B. & Q. Railway, 263 U. S. 1, 68 L. Ed. 131; and *Reading Company v. Koons,* 271 U. S. 58, 64, 70 L. Ed. 835. Typical of the host of other cases going to make up the overwhelming weight of authority referred to by this court in *Mellon v. Goodyear,* supra, are: *James Baird Co. v. Boyd.* 41 F. (2d) 578 (CCA 4th); *Seaboard Air Line Ry. v. Oliver,* 261 Fed. 1, (CCA 5th); *Western Union v. Preston,* 254 Fed. 229, (CCA 3rd); *Russell v. Cox,* 148 P. (2d) 221, (Idaho 1944). (The Idaho case just cited is interesting because it reaffirms the interpretation of the Idaho death statute put upon it by this court in *Northern Pacific v. Adams,* supra); *Ryan v. Poole,* 47 P. (2d) 981, (Washington); *Sewell v. A. T. & S. F. Railway Company,* 96 Pac. 1007, (Kansas). (This decision of the Supreme Court of Kansas is interesting also because it discusses and interprets its earlier opinion in *Chicago R. I. & P. R. Co. v. Martin,* 53 Pac. 461. It is noted that petitioners in their brief rely upon 25 C. J. S. 1145, Death, and authorities therein cited. C. J. S. lists these authorities as *Adams v. Northern Pacific R. Co.,* 116 Fed. 324, (C. C. A. Washington), and *Chicago R. I. & P. R. Co. v. Martin,* supra. This *Adams* case was reversed by *Northern Pacific v. Adams,* supra, and the *Martin* case was overruled by *Sewell v. A. T. & S. F. Railway Company,* supra.) *Mason v. Union Pacific Railroad Company,* 7 Utah 77, 24 Pac. 796.

The grotesque length to which the logic of the petitioners' contention would carry them is demonstrated by the case of *Ryan v. Poole,* supra, which arose in the state of Washington and was ultimately decided by the Supreme Court of that state. There a brigand with felonious intent undertook to rob a milk truck. While engaged in this criminal act he was killed by the truck driver. His heirs, completely deceived by the theory now espoused by counsel for petitioners sought to recover for the death of the deceased on the theory that their cause of action came into existence only upon his death and was therefore freed of any impairment attaching to decedent's conduct in the circumstance which brought his death. This is what the Supreme Court of Washington thought about it:

"It is also generally held, and the decisions of this court are to the same effect, that, if a deceased could not have recovered damages for his injury had he survived, his heirs or personal representatives cannot recover, because their right of recovery is dependent upon the right which the deceased would have had had he survived. If the deceased had no cause of action, none accrues to his heirs or personal representatives.

"The words 'wrongful act or neglect,' used in the statutes of this nature in defining the quality of the act causing the injury and death, it seems to be universally agreed by the courts, mean wrong or neglect as against the deceased; that is, in the sense that the deceased could have recovered damages for the injury resulting in his death.

"Had Emmett C. Ryan survived his injury, and brought an action therefor, it is clear that he could not have prevailed, because at the time of the injury he was engaged in the performance of an unlawful and criminal act. The right of the appellant to recover being dependent upon the deceased's right, had he survived, it necessarily follows that the demurrer to the complaint was properly sustained. This may be measuring the rights of the heirs and personal representatives by the personal disability of the deceased, had he survived, but, if it be so, it is a conclusion which the settled law requires."

To show that the rule announced by this court in the cases which we have just discussed is regarded as the controlling rule, we invite the court's attention to certain well-respected texts: Restatement of the Law of Torts, Vol. 4, Section 925 page 639; Tiffany, Death by Wrongful Act, Second Edition, Sections 62 and 63, page 131; 16 American Jurisprudence, 61 and 78; 17 Corpus Juris, 1199-1201; Robert's Federal Liability of Carriers, Vol. 2, 2nd Ed., Section 900, page 1756. See also the annotation at 39 A. L. R. 579.

The wrongful death statute of Utah[3] under which petitioners claim is, as its name implies, an act authorizing an action for wrongful death. A wrongful death results from failure to discharge a duty owing the decedent. The free pass limited in a lawful manner the duty owing from the company to Francis as a result of which in the absence of willful misconduct there was no breach of duty and hence no wrongful death. This principle is recognized by all of the decisions and texts above cited, but is entirely overlooked by counsel in their brief. Counsel in their brief referred to two Utah cases: *Mason v. Union Pacific Railroad Company*, supra, and *Halling v. Industrial Commission*, 71 Utah 112, 263 Pac. 78. The *Mason* case is relevant because it involved the wrongful death statute of Utah. In that case, however, the Supreme Court of Utah stated:

> "These sections give to the personal representatives or heirs a right of action against the person whose wrongful act or neglect causes the death of another *when* the deceased, *if he were living*, could maintain one. *If the person sustaining the direct injury from the wrongful act or neglect had a right of action for it*, his heirs have one for their injury for his death caused by the same act or neglect." (Italics ours)

The *Halling* case, however, is clearly distinguishable from the case at bar, because it arose under the workmen's compensation law of Utah.[4] Any discussion of the wrongful death statute as distinguished from the compensation act must be regarded as dictum. The right to compensation in the *Halling* case, whether in the employee or in his dependents, in no sense depended upon wrongful injury or death. The fact of accidental injury or accidental death within the course of employment was all that was material there. The difference between compensation cases and cases for wrongful death is clearly recognized by the courts.

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[3] See Appendix.
[4] See Appendix.

For instance, in *Lewis v. Connolly Contracting Co.*, 264 N. W. 581, the Supreme Court of Minnesota, while recognizing the rule as announced in *Vreeland's* case, pointed out the distinction between wrongful death cases and those arising under the workmen's compensation act. Note this language from the Minnesota decision:

> "The court in the *Vreeland* Case further said: 'But as the foundation of the right of action is the original wrongful injury to the decedent, it has been generally held that the new action is a right dependent upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury.'
>
> "This clearly refers only to actions at law to recover for death caused by negligence or tort of the employer. It should have no application to a proceeding under a Workmen's Compensation Law such as ours, where the proceeding is not based on any original wrong. The cases cited under that quoted paragraph are all actions to recover for wrongful death."

From the foregoing it will be seen that the controlling authority upon the subject sustains the contention that the conditions upon the pass which was given gratuitously to Francis for an interstate trip stand as a bar against any recovery for injury to or death of Francis by reason of the negligence of defendant company as distinguished from willful or wanton misconduct.

Jury Properly Drawn

Rule 59(b) of the Rules of Civil Procedure provides that a motion for a new trial shall be served not later than ten days after entry of judgment. Sub-section (c) of the same rule provides that when affidavits are relied upon they must be served with the motion; and sub-section (d) provides that not later than ten days after judgment the trial court on its own initiative may grant a new trial.[1]

[1] See Appendix.

Judgment was entered in this case on May 2, 1946. On May 8, 1946, and within the time fixed by the rule, a motion for new trial was served upon respondent. That motion in no way questioned the manner in which the jury list was made up or the panel selected. On June 13, 1946, thirty-one days after the time within which to file the motion for a new trial had expired, petitioners filed another motion for new trial. By paragraphs 16, 17, 18 and 19 of the new motion they attacked the jury panel, as well as the particular jury which tried the case. Then, for the first time, petitioners raised objection to the jury. Thereafter on June 18, 1946, thirty-six days after the time within which the rules permit the filing of such affidavits, petitioners filed certain affidavits purportedly in support of their motion for new trial. Respondent moved to strike the new motion for new trial and particularly paragraphs 16, 17, 18 and 19 thereof, and moved to strike the affidavits upon the ground that they were served and filed out of time. When the motion for new trial was called for argument, respondent renewed its motion and urged upon the trial court that the amended motion for new trial, and particularly paragraphs 16, 17, 18 and 19 thereof and the affidavits filed on June 18, 1946, were not properly before the court. (R. 44, 223-224) The same matter was called to the attention of the Circuit Court of Appeals. No ruling was ever made upon the motion to strike, but by its decision the Circuit Court of Appeals clearly recognized that the motion and affidavits had been filed after the time fixed by the governing rules of procedure. (R. 279, 280)

Counsel for petitioners have long practiced before the trial court. They maintain their offices within one block of the clerk's offices. Trial of this case was called for April 26, 1947. Approximately two weeks before that time the clerk of the court mailed to counsel for petitioners a list of the names from which the trial jury would be selected. (R. 234) Thereafter during the business hours of each day the clerk's office was open and persons were in attendance to answer any questions propounded concerning the jury. Counsel were free during all that time to make such inquiry

as they might deem useful. It does not appear from the record that they ever bothered to make any such inquiry.

It does appear though, that counsel, possessed of the list of jurymen sent them by the clerk, came to court on the appointed day to participate in the selection of a jury. Upon convening of court counsel informed the trial judge that they were not ready to go to trial but were ready to select a jury. (R. 46) Thereupon the requisite number of veniremen were called into the box and a jury was drawn and accepted by both sides. (R. 46, 62)

Following the exercise of challenges, counsel for both sides accepted a jury on April 26th. During the selection of the jury and prior thereto there was never a breath of criticism from petitioners' counsel as to the makeup of the panel or the competency of those upon the panel to serve. There never was an inkling that counsel might speculate on the jury as constituted for a verdict and then if disappointed seek to question the competency of the entire panel. The twelve persons selected by counsel for both sides to try the case were: Parley N. Winn, an employee in a feed store in Richmond, a farming village; Percy B. Wright, an employee of Bennett Glass and Paint Company, a corporation in the city of Ogden; Kenneth K. Leonardson, a grocer in the farming village of Kaysville; Jack Pogue, employed to drive a freight truck between Salt Lake City and Southern Utah; Marjorie McMurrin, a housewife from a farming community in Northern Utah; Theron R. Covey, manager of a dance hall in Salt Lake City; Carl W. Huhl, an employee of Z. C. M. I. Department Store in Salt Lake City; Lourie A. Bennett, manager of a local retail coal office in Salt Lake City; Vesta Cahoon, wife of a letter carrier; William Evans, Jr., employed in a garage in Logan, an agricultural community in Northern Utah; M. L. Jones, who repaired refrigerators in Bountiful; a farming community north of Salt Lake City; and O. Early House, a salesman in Tooele, an agricultural and mining village in Western Utah. Inasmuch as a jury consists of only twelve persons, it certainly cannot be said that the foregoing twelve

did not constitute a cross-section, representative of the activities of the State of Utah.

After the selection of the jury, the actual taking of evidence did not begin until April 29th. Two and one-half full days passed between the time counsel knew who their jury was to be and the taking of any evidence. The taking of evidence began on April 29th and was concluded on May 1st. The jury was instructed and retired to deliberate on the afternoon of May 1st. It returned its verdict into the court on the morning of May 2nd. During all of those proceedings there was never a word of criticism of the jury panel or the method of its selection. Settled law and the requirements of fair play demand that counsel make their objections before, not after, verdict. *Queenan v. Territory of Oklahoma,* 190 U. S. 48, 47 L. Ed. 1175; *Holmes v. U. S.,* 134 F. (2d) 125, (C. C. A. 8th); *King v. Leach,* 131 F. (2d) 8, (C. C. A. 5th); *Spivey v. U. S.,* 109 F. (2d) 181, (C. C. A. 5th); *Carruthers, et al v. Reed,* 102 F. (2d) 933, (C. C. A. 8th); *Needham v. U. S.,* 73 F. (2d) 1, (C. C. A. 7th); *Union Electric Light and Power Co. v. Snyder Estate Co.,* 65 F. (2d) 297, (C. C. A. 8th); *Zito v. U. S.,* 64 F. (2d) 772, (C. C. A. 7th); *Strang v. U. S.,* 48 F. (2d) 1006, and 53 F. (2d) 820, (C. C. A. 5th); *Bush v. U. S.,* 16 F. (2d) 709 (C. C. A. 5th); *Browder v. Cook,* 59 F. Supp. 675, (D. C. Idaho); *U. S. v. Peterson,* 24 Fed. Supp. 470, (D. C. Pa.); *Monday v. State,* 23 S. W. (2d) 656, (Tenn.); *Knauf v. State;* 1 S. W. (2d) 619, (Texas); *Roush v. U. S.,* 47 F. (2d) 444, (C. C. A. 5th). See also *Bennett v. Tintic Iron Co.,* 9 Utah 291, 34 Pac. 61.

The Rules of Civil Procedure by rule 59 provide for the filing of motions for new trial. Rule 59(b) provides that "motion for a new trial shall be served not later than ten days after the entry of judgment." The only exception provided by the rule is to be found when the motion for a new trial is grounded on newly discovered evidence, in which case the motion may be made after the expiration of the period fixed by the rule "with leave of court obtained on notice and hearing and on a showing of due diligence."

On June 18th, five days after filing the new motion, petitioners undertook to serve upon respondent and to file with the court numerous affidavits in support of paragraphs 16, 17, 18, and 19 of their new motion. Rule 59(c) provides in part: "When a motion for a new trial is based upon affidavits, they shall be served with the motion * * *." So if the Rules of Civil Procedure mean what they say, and the rules which we invoke seem to be free of any ambiguity, the motion filed on June 13th and the affidavits filed on June 18th, 1946, were not properly before the trial court and should not be considered a part of the record on appeal. *Marshalls' U. S. Auto Supply, Inc., v. Cashman,* 111 F. (2d) 140, (C. C. A. 10th); *Safeway Stores, Inc., v. Coe,* 136 F. (2d) 771, (C. A. for D. C.); *Freid v. McGrath,* 133 F. (2d) 350, (C. A. for D. C.); *U. S. v. Newbury Mfg. Co., et al,* 123 F. (2d) 453, (C. C. A. 1); *Wolpa v. U. S.,* 84 F. (2d) 829, (C. C. A. 8th); *Peterson v. Chicago G. W. Ry. Co.,* 3 F. R. D. 346, (D. C. Neb.); *Aydia v. Denver & Rio G. R. Co., et al,* 45 Utah 459, 146 Pac. 559; *Luke v. Coleman,* 38 Utah 383, 113 Pac. 1023; *Blue Creek Land and Livestock Co. v. Anderson,* 35 Utah 61, 99 Pac. 444.

Counsel made a belated effort to bring themselves within *Thiel v. Southern Pacific,* 328 U. S. 217, 66 S. Ct. 984. That case does not support counsels' position because in the *Thiel* case plaintiff raised and insisted upon his objection to the jury panel before a trial jury was ever drawn and to protect himself against waiver, pressed his objection to the jury panel at all appropriate times thereafter.

Counsel in this case never had any faith or confidence in their motion for new trial. When the matter came on for argument before the trial judge, counsel for petitioners at one point said:

> "It may be, your Honor might feel these affidavits are untimely, that the motion for a new trial should have been more complete and full at the time it was made. It may be the court will feel that the jury

should have been challenged before the trial was started. I cannot change the record on that. * * *"

There was clear recognition that his motion was filed out of time and that his objection should have been made before the trial started.

To summarize briefly, it thus appears without contradiction in the record that appellants were not only provided well in advance of trial with a list of the jurors from whom the jury finally selected would be drawn, but were afforded ample time and opportunity to discover any and all defects or irregularities which might exist in the manner of the original selection of all jurors for jury duty in the court. It likewise appears that petitioners announced themselves as being ready to select a jury and after such selection passed the jury for cause. Never once did petitioners give any indication of any dissatisfaction regarding the jury until after judgment had been entered and after their motion for a new trial had been filed. Then the counsel filed their belated motion for a new trial and called upon the court to correct an "apparent manifest" miscarriage of justice. It has been shown that petitioners' new motion and subsequent affidavits raising the jury question came too late. Even with all this, one additional fundamental principle of law precludes this matter being now properly before this court, for it is well settled that an order of the trial court denying a new trial is not reviewable on writs of error, it being a discretionary matter with the trial court and except for a clear abuse of that discretion such ruling will not be disturbed. *U. S. v. Socony-Vacuum Oil Company*, 310 U. S. 150, 84 L. Ed. 1129; *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U. S. 474, 77 L. Ed. 439; *Blytheville Cotton Oil Co. v. Kurn*, 155 F. (2d) 467, (C. C. A. 6th 1946); *Lemly v. Christopherson*, 159 F. (2d) 291, (C. C. A. 5th, 1945); *Jordan v. Fed. Farm Mtg. Co.*, 152 F. (2d) 642, (C. C. A. 8th, 1945); *Gerson v. Anderson-Prichard Production Corp.*, 149 F. (2d) 444, (C. C. A. 10th, 1945) (citing *Long v. U. S.*, 133 F. (2d) 652, (C. C. A. 10th)); *Daffinrud v. U. S.*, 145 F. (2d) 724, (C. C. A. 7th, 1944);

U. S. v. Bransen, 142 F. (2d) 232, (C. C. A. 9th, 1944); *McDonough et al v. U. S.*, 299 Fed. 30, (C. C. A. 9th, 1924). The action of the court below in hearing all of petitioners' evidence, affidavits and argument on this jury question while yet reserving its ruling on the motions to strike and the objections of respondent that such were never properly before the court makes it "manifestly apparent" that petitioners' claim of abuse of discretion is untenable. See *U. S. v. Socony-Vacuum Oil Co.*, supra, *McDonough et al v. U. S.*, supra.

WHEREFORE, it is respectfully submitted that the petition for writ of ceritorari in this case should be denied.

PAUL H. RAY

S. J. QUINNEY

Counsel for Respondent

RAY, QUINNEY & NEBEKER

and

GRANT C. AADNESEN

Of Counsel

APPENDIX

Cross Examination of Clarence A. Russell, Head Brakeman on Second 21

"A. There were 20 cars in our train and after the collision some of them were criss-crossed over the track; some of them came out of the train and were thrown off the track and in each case where that occurred there was a break in the train. As the car left the train and criss-crossed, that shortened the train up.

Q. And the buckling out of the train of a car from time to time could well account for those lurches you described, couldn't it?

A. Possibly.

Q. Did you account for it in that way?

A. I don't know.

Q. But there were three separate lurches?

A. Distinct shocks, yes, sir.

Q. And they could have occurred by the buckling out of the train of certain cars?

A. Yes, sir." * * * (R. 98)

"Q. There is an anglecock on the front of the engine, isn't there?

A. Yes, sir.

Q. So if it should happen to hook up with another engine you could connect up the air between them?

A. Yes, sir.

Q. And if you break that angelcock you set the air in the whole train, don't you?

A. Immediately, yes, sir.

Q. What?

A. Immediately, yes, sir.

Q. So just the instant you break the anglecock off the front of that engine, the air went back to the rear car you were in faster than your train was moving, didn't it?

A. I don't know.

Q. Don't you know as an engineer—as a railroad man—that it does?

A. I don't know.

Q. You have no opinion?

A. No, sir.

Q. What is your judgment as to whether the air moves back from that engine to the 20th car at a speed faster than 40 miles an hour?

A. It is possible, yes, sir.

Q. Don't you think it does?

A. I think so.

Q. So just the minute that anglecock cracked, that train in front—or the air went on the end of your car, didn't it?

A. I don't know.

Q. Do you think it did or didn't?

A. I don't know.

Q. What would you expect when you break the train-line, whether the air would go back into your car or not?

A. If the train line is broken the brakes apply immediately.

MR. RAY: Isn't any question about it. One other question:

Q. The car you were in was the last car, wasn't it?

A. Yes, sir.

Q. And it stayed on the track?

A. Yes, sir.

Q. So that it was subject to emergency application of the brakes, wasn't it?

A. Yes, sir.

Q. And it did go into emergency, didn't it?

A. I don't know.

Q. You don't know?

A. No, sir.

Q. Did you hear engineer Ware say that it has to go into emergency once the air line is broken?

A. If it is broken, yes, sir.

Q. That is true, isn't it?

A. Yes, sir.

Q. There is no doubt your train was broken, is there? You have testified you saw cars criss-crossed over the tracks, haven't you?

A. Yes, sir.

Q. So you do know the emergency went back into your car, don't you?

A. Yes, sir.

Q. Now, you also know, do you not Mr. Russell, that your car moved five or six hundred feet after the first impact?

A. Yes, sir. * * *" (R. 98, 100)

"Q. Now, you have no doubt that the emergency set in your car, do you?

A. I didn't feel the emergency application.

Q. As you sit there right now you have no doubt it did, do you?

A. There is no doubt.

Q. You have no doubt that the emergency would be set in your car if the anglecock was knocked off the front of your locomotive by the collision, have you?

A. As soon as the train line was broken." • • •
(R. 101-102)

"A. I appeared at the inquest held in Ogden on the 16th day of January, 1944, and gave testimony. There were 9 cars derailed out of the train, with 11 cars standing upright.

Q. I want to read a part of the testimony you there gave; see if I read it correctly. Were you asked this question: 'Mr. Russel, you have a good many years as a brakeman and conductor, and you know the application of brakes, do you not?' And you answered: 'Approximately.'

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. 'And from your experience of having it applied at various times and conditions'? Your answer was: 'Yes, sir.'

A. Yes, sir.

Q. Then this question: 'This heavy application you referred to, was that in your opinion,—and this leads to the question one of the jurors asked,—was that, in your opinion, the application of the brakes by some one, or could it have happened by the impact?' Do you remember that question?

A. Yes, sir.

Q. And your answer: 'I cannot say.' Do you remember giving that answer?

A. Yes, sir.

Q. And then the next question: 'You do not know?' And your answer: 'No, sir.' You gave those answers at the inquest?

A. As I remember, yes, sir.

It is my position now that I am unable to say whether or not the application of brakes which I felt resulted from someone applying them or from the impact itself." (R. 102)

Upon recross examination Brakeman Russell testified:

"I don't know whether the cars that were pinched out of the train went out all at once or at intervals. If they went out one or two at a time over a very brief period, that would check the movement of the train, would probably cause it to lurch." (R. 105)

Cross Examination of Dale Altman, Rear Brakeman on Second 21

"A. I testified at the Interstate Commerce Commission hearing on January 6, 1945, and 10 days later I appeared and gave testimony at the inquest and I was sworn in both instances. My first impression was that there was a lapse of time between the application of the brakes and this shock or lurch, which I referred to of 30 to 35 seconds. I later witnessed an experiment and revised my idea of the time which elapsed to approximately 12 seconds.

Q. Now, at the time you testified on January 6th and again on January 16th, it never had occurred to you that there was any emergency application of the brakes in that car had it?

A. No, I couldn't tell whether it was; as far as I know there was no emergency application.

Q. It had not occurred to you, had it?

A. No.

Q. But you know now when you think of it and you know your train was broken in two, you know there was, don't you?

A. Well, there would have to be to break the train line.

Q. You know there was now as you sit here and think about it in that light, don't you?

A. Well, I don't know for sure.

Q. Well, you found your air was working all right when you left Ogden?

A. Yes.

Q. And you know when the trainline breaks any place you just cannot help setting the emergency brakes, don't you?

A. That is right.

Q. So don't you have to conclude now, Mr. Altman, that there was emergency application on that car?

A. Well, that is the ultimate result, yes, sir.

Q. So you agree with us on that?

A. Yes, sir." * * * (R. 110-111)

"A. I recall my testimony given at the inquest.

Q. Do you remember this question being asked to you: 'Was it the type of application that might have been caused by the impact?' Do you remember that question?

A. I don't recall it now.

Q. Would you say that was or was not put to you?

A. Yes, I imagine it was.

Q. And your answer: 'I wouldn't be able to say as to that, it is possible.' Do you remember that?

A. Yes, sir.

Q. And then the question: 'Have you formed any independent opinion on that point?' And your answer: 'No, I wouldn't pass an opinion on it.' Do you remember that?

A. That is right.

Q. And is that still correct?

A. Yes, sir.

Q. This application of the brakes that you felt may or may not have been caused by the impact?

A. That is right. I have no way of knowing." (R. 112)

Cross Examination of James W. Welch, Conductor on Second 21

"Q. Mr. Welch, you have appeared at both the Interstate Commerce Commission hearing and the inquest, did you not?

A. Yes, sir.

Q. Would you now state—having thought about the matter and having heard the testimony given here today—Mr. Welch would you now state it must have been an emergency application of the brakes on your car?

A. Prior to that wreck, I didn't know what an emergency application was like on a passenger train. Since that time I have had two or three occasions to witness an emergency stop and there was very little difference in the action from these emer-

gency stops that have been made recently with me on a passenger train and that one there; they both had the same effect. I might add this: there is a difference between an emergency stop—the effects of an emergency stop—on a passenger train and on a freight train.

At the time of the application I was busy with my book work. My attention was focused upon what I was doing and my attention was first distracted by the application of the brakes. Since that time I have had experience with emergency stops on passenger trains.

Q. Now, from that experience are you now able to say that the applications of the brakes you felt on this occasion were substantially the same as those emergency applications you felt since then?

A. That is right.

Q. Your answer is yes?

A. Yes, sir.

Q. And you also know from your long experience in train service that by reason of the breaking of your train it was inevitable that the emergency brake would set on your car?

A. Well, any time a trainline is broken on a train, on any part of the train from the engine to the rear end, will cause an emergency action.

Q. Now, so then I take it, Mr. Welch, that the application of the brakes which you felt on this occasion may very well have been caused by the impact?

A. As far as I know." • • • (R. 120)

(Question read as follows:) Now, if there was only one application of air in view of the fact that this train

line was broken all to pieces, that one single application must have been an emergency, must it not, Mr. Welch?

A. Yes." * * * (R. 125)

"Q. But you felt only one application of the brakes?

A. Yes.

Q. And there being only one you are satisfied now that was an emergency application, isn't that correct?

A. I think so." (R. 126)

Hepburn Act

49 U. S. C. A. Sec. 1 (7) (as amended June 19, 1934, c. 652, § 602 (b), 48 Stat. 1102; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; Sept. 18, 1940, c. 722, Title I, § § 2, 3 (a, b), 4, 54 Stat. 899, 900, 901.)

"No common carrier subject to the provisions of this chapter, shall, directly or indirectly, issue or give any interstate free ticket, free pass or free transportation for passengers, except to its employees * * * and the families of any of the foregoing * * *."

Utah Wrongful Death Statute

Utah Code Annotated, 1943:

"104-3-11. Death of Adult—When Heir and Representative May Sue.

"Except as provided in chapter 1, of Title 42, when the death of a person not a minor is caused by the wrongful act or neglect of another, his heirs, or his personal representatives for the benefit of his heirs, may maintain an action for damages against the person causing the death, or, if such person is employed by another person who is responsible for his conduct, then also against such other person. If such adult person has a guardian at the time of his death, only one action can

be maintained for the injury to or death of such person, and such action may be brought by either the personal representatives of such adult deceased person, for the benefit of his heirs, or by such guardian for the benefit of the heirs as provided in the next preceding section. In every action under this and the next preceding section such damages may be given as under all the circumstances of the case may be just. (C. L. 17, § 6505.)"

Workmen's Compensation Act of Utah

Utah Code Annotated, 1943.

"42-1-43. Compensation for Industrial Accidents to Be Paid.

"Every employee mentioned in section 42-1-41 who is injured, and the dependents of every such employee who is killed, by accident arising out of or in the course of his employment, wheresoever such injury occurred, provided the same was not purposely self-inflicted, shall be entitled to receive, and shall be paid, such compensation for loss sustained on account of such injury or death, and such amount for medical, nurse and hospital services and medicines, and, in case of death, such amount of funeral expenses, as is herein provided. (L. 19, p. 154, §3113.)"

Federal Rules of Civil Procedure

28 U. S. C. A., following Section 723c:

"Rule 59. New Trials

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a

jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgement if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment, except that a motion for a new trial on the ground of newly discovered evidence may be made after the expiration of such period and before the expiration of the time for appeal, with leave of court obtained on notice and hearing and on a showing of due diligence.

(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has ten days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor."